

House Bill 831
March 23, 2007
Presented by Bob Lane
House Natural Resources Committee

Mr. Chairman and committee members, I am Bob Lane, Chief Legal Counsel of Montana Department of Fish, Wildlife & Parks (FWP).

Despite the fact that FWP opposes this bill, it is a significant step in the right direction. It is to Representative McNutt's credit that he has addressed the central elements of allowing development in closed basins while protecting senior water right holders. Most significantly, the bill would allow for mitigation of adverse affects to existing water users caused by a new ground development. Without allowing mitigation, the State of Montana must either say no to further groundwater development, or yes to adverse affects to existing water users.

One very important improvement is that the bill recognizes the proper role for a hydrogeologic assessment in a new groundwater application. The assessment must examine groundwater characteristics and determine whether a proposed new use of groundwater would deplete surface water. If so, then the determination of whether an existing water user would be adversely affected by the new use is made separately.

Unfortunately, the bill also has more fundamental problems. The following are some of the unresolved areas:

1. **Lack of a described process.** There are a number of key decisions required by HB 831. Decisions must be made on the adequacy of the hydrogeologic assessment, whether there will be a net depletion to surface water or not, and whether the proposed mitigation or aquifer recharge plan is adequate. The bill is silent on the process to be used. Will DNRC be required to make these key decisions unilaterally, will objectors and applicants be allowed an opportunity to be heard, will there be an opportunity for a contested case hearing, and will there be a sequence of hearings or one combined hearing? These process issues are not addressed in the bill.
2. **Regulatory role of the Bureau of Mines and Geology.** Another example is Section 16 that assigns a regulatory role to the Bureau of Mines and Geology. It requires DNRC to submit hydrogeologic assessments and related information to the Bureau. The Bureau is to provide comments to DNRC on the scientific adequacy of the assessment within 90 days. This process may be valuable if the Bureau's role were truly advisory. But the bill also states that if the Bureau does not provide DNRC a written scientific opinion within 90 days, the assessment must be deemed adequate. In other words, the report can sit unread on someone's desk and three months later it's deemed adequate and there's nothing DNRC can do about it. If the Bureau is to have a role in assessing the hydrogeologic reports, it should be advisory only, not one that can ripen into regulatory authority by 90 days of inaction.
3. **Closed basin study.** The closed basin study seems to be predicated on pumping tests to physically measure the impacts on surface water. Generally such measurements are not physically possible. The emphasis should be on hydrological modeling to calculate depletions to surface water.

4. **Detailed requirement of hydrogeologic assessment.** The detailed requirement for a hydrogeologic assessment should concentrate on the connection between the ground water source and streams or rivers and on the amount of net depletion of surface water. FWP does not believe the requirements of Section 16 accomplish this goal. The specifics of what needs to be addressed by a hydrogeologic assessment are the kinds of details best established by agency rulemaking. DNRC will have the time to adequately analyze the issues and requirements, and to receive and consider public input.

5. **Previously approved augmentation plan.** Section 21 may be a taking of private property. Anyone (outside of the Clark Fork Basin) who has an augmentation plan and permit, that has been overturned by a court, will have their private property right taken away by Section 21. There may be only one successful applicant in this category making this provision also unconstitutional as special legislation. There is no practical need for this section.